Supreme Court, U.S
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No. 07-1597

IN THE

SUPREME COURT OF THE UNITED STATES

BHUPENDRA K SHAH- PETITIONER

vs.

HELEN HAYES HOSPITAL, AND NYS DEPARTMENT OF HEALTH - RESPONDENTS

ON PETITION FOR A REHEARING TO THE SUPREME COURT OF THE UNITED STATES

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Point I

Reasons for filing a petition for rehearing.

Your honor, the following paragraphs explain the reasons for filing this petition for a rehearing:

Reason 1: Since, the Court of Appeals for the Second Circuit had foreclosed the opportunity to litigate the petitioner's constitutional rights, this court retains an independent duty to review the factual findings where Petitioner's Fourteenth Amendment rights are at stake. Your honor, this court has the final authority to enforce petitioner's 5th and 14th Amendments rights.

Reason 2: Your honor, the petitioner files the petition for a rehearing because (a) he might not have explained that the respondents Helen Hayes Hospital et al are State Government, and because (b) he failed to identify those state laws that were responsible for deprivation of his Fourteenth Amendment rights. These factors may have been responsible for not being able to comprehend the petitioner's questions.

Point II

Analysis of Question 1

Your honor, the plain meaning of the first question is "did the second circuit err when it denied petitioner's Fourteenth Amendment right?" However, the above question can safely be dissected into the following six components: (1) What were the principles of Stare decisis that were in conflict; (2) What were the legislative history that formed the basis for recognizing them as the doctrines or principles of stare decisis? (3) Which were theState laws that formed the basis to justify the deprivation of the petitioner's Fourteenth Amendment rights? ; (4) What were the State actions that deprived the petitioner's Fourteenth Amendment rights with analysis? ; (5) why is the precedent cited and applied by the court of Appeals for the 2nd Circuit inappropriate when it concluded that the petitioner is using his opposition to a dispositive motion as a means to amend his complaint?; and (6) What were the controversies among the circuits about interpretation of 28 U.S.C. § 636(b)(1)?

(II. 1) Principles of stare decisis :

The two principles involved are: (a) The Fourteenth Amendment to the constitution and (b) the Accrual of a cause of action.

(II. 2) Legislative history of the two principles.

The legislative history of the Fourteenth Amendment and of Accrual of Cause of action are as follows:

(II. 2. a) The Fourteenth Amendment :

The legislative history of the Fourteenth Amendment is given in United States v. Morrison et al, 529 U.S. 598 (2000). So it is not duplicated here.

Here, the State of New York not only denied the petitioner of his several claims of Equal protection clause of the Fourteenth Amendment rights but also "coerced" him in participating in the State's Early Retirement Program (Please refer to following sections for detail analysis).

(II. 2. b) Accrual of Cause of Action:

Accrual of cause of action is defined as "[A] limitation period begins to run when the plaintiff 'knows or has reason to know of the injury which is basis for his claim." Regarding the legislative history of accrual of cause of action, please refer to Rawling v. Ray, 312 U.S. 96 (1941) and Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferber Corp. of Cal. 522 U.S. 192. The Bay Area Laundry and Dry Cleaning Pension Trust Fund case law became a doctrine itself because almost all court of appeals including the D.C. Circuit have quoted and adopted this case law as a basis for ascertaining the accrual date for a cause of action.

(II. 3) Which were the State laws ... right?

The following state laws were involved in deprivation of the petitioner's Equal Protection Clause of the Fourteenth Amendment:

(i) New York's Civil Rights Law:

McKinney's Consolidated Law of New York, Book 8, Civil Rights Law § 40-c(2) states:

> No person shall, because of race, color, creed Color or national origin, sex, marital status or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his civil rights, or any harassment, as defined in section 240.25 of the penal law, in the exercise thereof, by any person or by any firm, corporation, or institution, or by the State or any agency or subdivision of the State.

(ii) Civil Service Laws § 61(2):

New York Civil Service law § 61(2) entitled "Prohibition against out of title work" states:

> No person shall be appointed or promoted under any title not appropriate to the duties to be performed.

(iii) Rules and Procedure of the N.Y. State Dept. of Civil Service:

Rules & Procedure of Civil Service Dept. cannot be inconsistent with some specific statutory provision, or erect barrier to benefit conferred by the Legislature, but

the Department may unquestionably may otherwise establish its own rules and internal operating procedure. Marrow v. Tully, 1984 N. Y. 2d 918, reargument denied 64 N.Y. 2d 755, certiorari denied. 473 U.S. 924, 106 S. Ct. 14, 87 L.Ed. 2d 694.

In particular, the following two procedures are important in this case:

(a) In the February 14, 1989 memo, the Department of Civil Service developed the following two procedures for the administration of "Research Scientist series: (i) Each agency must establish an ad hoc panel consisting of selected top level senior research Scientists and administrators representing appropriate specialized fields, and (ii) This panel would be responsible for hiring, firing, promoting, classifying and reclassifying of research scientist.

(b) The panel is responsible for the assignment of the the approved speciality to the candidate.

(II. 4) What were State actions... analysis

In his petition at pages 4 through 8, the petitioner did identify State actions that had deprived him of the benefit of his Fourteenth Amendment rights. However, in retrospect, the petitioner forgot to include the following (labeled as (4.1)) most important claim of violation of his Fourteenth Amendment rights:

(II. 4. 1) Coercion by the State to participate in ERI

Mr. Czachorowksi , who was the Director of Human Resources of the agency of the State Government, threatened (i.e. Coerced) the petitioner with a layoff next year if he does not participate in the Early Retirement Program"ERI"). He didn't threaten any of the about sixteen employees, who participated in the ERI program. Your honor, the above information is in the Court record.

Here, the State discriminated and coerced the petitioner to participate in the ERI program because of his race and national origin. No other employee was

threaten with a layoff. This type of State action supports that the Civil Rights Law § 40-c(2) was not administered equally to all persons.

(II. 4. 2) Promotion to Research Sc. Position :

On or about August 29, 2000, a meeting between the State Legislators, the CEO of respondent HHH, CFO of respondent HHH, the personal director of HHH and the petitioner was held. In that meeting, the respondents had stated that they have no power to promote the petitioner and that the petitioner has to file an application with the Dept. of Civil Service for a promotion. During the discovery process, the petitioner learned from the February 14, 1989 memorandum of the Dept. of Civil Service that the respondents had the necessary and sufficient power to promote the petitioner. He also discovered that Dr. Dempster and Dr. Jerry Nieves twice were promoted by respondents without making an application on CC-2E form.

Here, the State violated its own Rules and procedure described in the February 14th, 1989 memoran-

dum of the Department of civil Service.

(II. 4. 3) Out of title work :

Dr. David Dempster, who was a foreigner at the time of hiring, was given a full freedom to work in his specialty of Bone Hestomorphmetry even though that specialty designation was not an approved specialty by the State. In contrast, even though the petitioner's specialty of "Biostatistics" was an approved specialty, he was not allowed to work in that specialty. Instead, he was ordered or forced to work in "systems development for a comprehensive management information network" (out of title work).

Here, the State violated the Civil Service Law § 61(2) because Dr. Dempster was performing the duties of an unapproved specialty designation of "Bone Hestomorphmetry." And it didn't administered the New York's Civil Rights Law § 40-c(2) Laws equally, when it did not allow the petitioner to work in the title of "Research Scientist II, (Biostatistics). There-

fore, the State violated the petitioner's 14th amendment rights.

(II. 4. 4) Unequal compensation :

The respondents treated the petitioner differently in compensation for a similar work. For instance, Mr. Czachorowski, who was the State's personal Director, has conceded that petitioner was working as "Associate Computer Programmer Analyst, Gr. 23" from at least 1997. In his brief opposing respondents' motion for a summary judgment, the petitioner explained that respondents had misled the EEOC by stating that the petitioner salary of $57,916 was above the average salary of $54,327 paid by Hudson Valley Hospital Industry Group to a computer programer/analyst. The reason being that the average salary of $54,327 was not based on 40 hr/wk, but was based on 35 hr/wk. If one adjusts the hour factor, it comes to out to be $58, 724.90 and not $54,327.00 as reported to EEOC. In addition, the respondents failed to compare the compensation paid to employees with similar titles. For instance, the petitioner was working as

an "Associate Computer Programmer Analyst" which title is equivalent to a title of "Assistant MIS director" in the Industry group. The average annual compensation for the position of "Assistant MIS director" was $78,828.06, whereas Petitioner was paid only $57,916. Thus, the State treated the petitioner differently in terms of compensation for equivalent title and for performing the same work. (For more details, please refer to section A.4 at page 7 of the petition).

Here, the State violated its own New York's Civil Rights Law § 40-c(2) , when it treated the petitioner differently in terms of his compensation for the similar title or work.

(II. 4. 5) Discrimination in assignment of office space :

The petitioner submitted the evidence supporting that Ennis (the State actor) had grudgingly conceded that respondent converted a hallway without a door as an office space for Petitioner. In a similar situation, the State provided red carpet service (such as 14' x 14' office space with a key and lock, wall to wall carpet,

equipment etc.) to foreign scientists. In addition, the State provided a job to the wife of a foreign scientist with a regular office space (14' x 14' office space with a lock, wall to wall carpet etc.) . In stark contrast, the respondent converted a hall way as an office space (without even a door) for the American Scientist educaated at Yale. (For details, please section (A.5) at page 8 of the petition).

Here, the State violated New York's Civil Rights Law § 40-c(2) , when it treated the American minority petitioner differently in terms of assignment of office space and in providing a job to his wife.

(II. 4. 6) Discrimination in training:

The July 12, 2005 memo from Mr. Ennis supports that he sent all (except the Petitioner) professional staff of MIS (including a white temporary employee who had no protection of Civil Service law) and several other employees excluding employees of Indian national origin to Boston for Meditech training. In a similar situation, no such training opportunity was

provided to the employees of Indian National origin including the petitioner.

The respondent replaced the RG system with the Express Writer System in 1997-98. The respondent sent Mr. Robert Fitzsimmons (W) and Mr. Art (W) for training to Atlanta even though their duties were not job related (meaning they had no experience in developing hospital reports). In contrast, the petitioner's supervisor, who was a private contractor at the time, directed the petitioner to convert all "RG" reports to Express Writer system. When the petitioner requested training, his request was turned down. The supervisor then ordered the petitioner to work very hard for the exclusive benefit of him.

The State did not administer the New York's Civil Rights Law § 40-c(2) equally, when it denied the required training to the petitioner during his tenure at the MIS Department and treated him differently than white employees (pubic as well as private).

(II. 4. 7) Promotion to the Administrative position.

Mr. Robert Close (W) was appointed as a "Respiratory therapist." In between 1997-1999, the State created an "Administrative position" exclusively for Mr. Close. He was then immediately promoted to that position even though he had no experience in administration. In stark contrast, even though the petitioner was in the administration department, was working on administration's project and was qualified to perform the duties of the newly created position, he was not provided with the promotional opportunity.

In addition, when Mr. Close resigned on or about July 24, 2001, the State abolished his position in order to deprive the benefit of promotion to the petitioner. The State discriminated the petitioner in promotion because of his race and national origin.

The State violated New York's Civil Rights Law § 40-c(2), when it failed to promote the petitioner

in the newly created "Administrative position" and by abolishing Mr. Close's position when he resigned.

Your honor, the above are just a few instances of repeated deprivation of petitioner's 14th Amendment rights.

(II. 5) Why is the precedent cited and applied by the court of Appeals for the 2nd Circuit inappropriate when it concluded that the petitioner is using his opposition to a dispositive motion as a means to amend his complaint?

Your honor, in denying petitioner's 5th and 14th Amendment claims, the panel inappropriately applied its precedent to the facts of this case. The panel assumed that the petitioner was asserting his 5th and 14th amendment claims in his motion papers in response to defendant-appellees' motion for summary judgment. (See appendix page 5a of the petition). But the panel's assumption was not supported by the facts of this case. Because the petitioner never specifically raised the issue of amending his complaint. In fact, the

Magistrate Judge's R & R would supports that the petitioner did claim violation of some of his 5th and 14th Amendment rights (see page 12a of the appendix). In addition, when the petitioner found more violations of his 5th and 14th Amendment rights during the discovery process, he did include all (except one) of these claims (i) in his brief opposing defendant-appellees' motion for summary judgment, (ii) in his objections to the R & R, and (iii) in his briefs to the Court of Appeals. But the panel for the 2nd Circuit failed in its duty to comprehend these claims.

Your honor, assume that the court of appeals was correct in construing that "the petitioner was using his or her opposition to a dispositive motion as a means to amend his complaint" But the petitioner is entitled to amend his complaint because it is "the standard rule that [accrual occurs] when the plaintiff has ' a complete and present cause of action.'" Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferber Corp. of Cal. 522 U.S. 192. "[A] limitation period begins to run when the plaintiff 'knows or has reason to know of

the injury which is basis for his claim. Quoting Rodriguez-Narvaez v. Nazario 895 F.2d 38, 41 n5 (1st Cir. 1990). In general, the statute of limitations begins to run from the date a plaintiff knows or has reason to know of the injury that forms the basis of his claim. Leon v. Murphy, 988 F. 2d. 303, 308 (2d cir. 1993), which was cited by the Court of Appeals for the Second Circuit in Polancov v. U.S. Drug Enforcement Admin. 158 F. 3d 647 (2d Cir. 1998) and subsequently by the district Court in Pimental v. U.S. drug Enforcement Adm. 99 F. Supp. 2d 420 (S.D.N.Y. 2000).

Here, during the discovery process, the petitioner was able to discover the several other instances of violation of his Fifth and Fourteenth Amendment rights. Applying the case law of Bay Area Laundry and Dry Cleaning Pension Trust Fund (supra), the accrual of cause of action of petitioners' constitutional rights was the date when he discovered violation of his constitutional rights after complete discovery.

Therefore, the petitioner is entitled to amend

his complaint, and the Article III judges have abused their power for not applying the proper principle of Stare decisis including its own long standing precedent to the facts of this case.

(II. 6) Deprivation of constitutional rights by not following 28 U. S. C. § 636(b)(1) :

In his petition, the petitioner has explained in detail how the Second Circuit has omitted adjudicating his 5th and 14th Amendment rights. Since this court has considered that issue, it is not duplicated here.

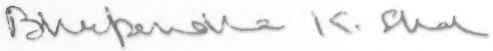
POINT III

Conclusion and Prayer

The petitioner humbly and respectfully prays this court to enforce the force of the doctrines of stare decisis (i.e. the Fourteenth Amendment and the Accrual of cause of action deprivation his constitutional rights) as the three state actors were repeatedly depriving the petitioner's 14th amendment rights for a

period of about sixteen years. The petitioner humbly prays this court to grant the petition for rehearing.

Respectfully Submitted



Bhupendra K Shah, Ph.D. (Yale)

Date : October 30, 2008

CERTIFICATE OF COMPLIANCE WITH THE RULE OF THE COURT.

The petitioner certifies (1) that the arguments presented in his petition for rehearing were not presented before; (2) that it is restricted to the grounds specified in the Rule 44(2) of the Rules of Supreme Court of the United States and (3) that it is absolutely submitted in good faith and not for delay.

Respectfully submitted

Bhupendra K. Shah

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